



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-T-, INC.

DATE: AUG. 14, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software development and IT consulting company, seeks to employ the Beneficiary as a programmer/business analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that the evidence of record did not establish that the Beneficiary had the requisite educational degree to meet the requirements of the labor certification and to qualify for advanced degree professional classification. Following our summary dismissal of the appeal, the Petitioner submitted a motion to reopen and a motion to reconsider.

Upon review, we will deny the motions.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security (DHS) policy. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

On motion the Petitioner submitted evidence demonstrating that the summary dismissal was erroneous and overcoming the Director’s ground for denial. Because the Petitioner has filed multiple Form I-140 petitions with multiple beneficiaries (I-140 beneficiaries), however, we reopened the proceedings by issuing a request for evidence (RFE) to obtain additional documentation of the Petitioner’s ability to pay the proffered wages not only of this Beneficiary, but

of its other I-140 beneficiaries. The Petitioner has responded to the RFE with additional documentation.

II. ANALYSIS

The issue before us is whether the Petitioner has established its ability to pay the proffered wages of all its I-140 beneficiaries. A petitioner must establish its ability to pay the proffered wage of the job offered from the priority date of the petition onward. A petitioner must establish that its job offer is realistic not only for the instant Beneficiary, but also for its other I-140 beneficiaries. See 8 C.F.R. § 204.5(g)(2). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, the Petitioner in this case must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and every other I-140 beneficiary from this petition's priority date of March 11, 2015, until the dates the other I-140 beneficiaries obtained lawful permanent resident status. See *Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).¹

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the instant beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), is considered proof of the petitioner's ability to pay the proffered wage of that beneficiary.

In this case the labor certification states that the proffered wage for the job of programmer/business analyst is \$116,813 per year, and that the Beneficiary began working for the Petitioner as a business system analyst in February 2015, before the priority date. The Beneficiary's Form W-2, Wage and Tax Statement, for 2015 shows that his gross pay that year was \$40,065.70. The record does not include the Beneficiary's Form W-2 for 2016 or 2017, but the Petitioner indicates that his gross pay in those two years amounted to \$75,832.66 and \$91,000, respectively. Thus, the wages paid to the Beneficiary have been well below the proffered wage in each of the last three calendar years.

As for the Petitioner's other I-140 beneficiaries, the evidence submitted in response to our RFE includes charts of 18 individuals (which include the instant Beneficiary) who were employed and paid by the Petitioner in the years 2015-2017, their priority dates, their proffered wages, and the

¹ The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

wages paid in their priority date years and subsequent years.² The charts and the accompanying Forms W-2, Wages and Tax Statements, issued to these individuals show that the wages paid to most of the I-140 beneficiaries were less than their proffered wages in each of the years 2015, 2016, and 2017. Only three out of eight I-140 beneficiaries in 2015, two out 12 in 2016, and five out of 18 in 2017, received wages paid that equaled or exceeded their proffered wages. The combined underpayments to the I-140 beneficiaries whose wages paid were lower than their proffered wages amounted to \$188,455.12 in 2015, \$277,928.68 in 2016, and \$266,996.83 in 2017.³ Thus, the Petitioner has not established its ability to pay the proffered wages of all its I-140 beneficiaries based on the wages paid to them in the last three calendar years.

If a petitioner does not establish that the wages paid to its beneficiaries have equaled to or exceeded their proffered wage from their respective priority dates onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the combined proffered wages or the difference between the combined proffered wages and the combined wages paid to the beneficiaries in a given year, the petitioner would be considered able to pay the proffered wages during that year.

In this case, the record includes copies of the Petitioner's federal income tax returns, Forms 1120, for 2015 and for 2016, which was the most recent filed by the Petitioner at the time of its response to our RFE. The 2015 tax return recorded net income of \$101,705 and net current liabilities of \$69,576, while the 2016 tax return recorded net income of \$122,980 and net current liabilities of \$760,188.⁴ Thus, in 2015 the Petitioner's net income was \$86,750.12 below the \$188,455.12 deficit between the proffered wages and the wages paid to its I-140 beneficiaries who were paid less than their proffered wages, and in 2016 its net income was \$154,948.68 below the \$277,928.68 deficit between the proffered wages and the wages paid to its I-140 beneficiaries who were paid less than their proffered wages. In neither year did the Petitioner have any net current assets. Accordingly, the Petitioner has not established its ability to pay the proffered wages of all its I-140 beneficiaries based on its net income or net current assets in 2015 and 2016.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and

² 16 of the 18 Form I-140 petitions were approved. The only exceptions are the instant petition, denied and now on appeal, and the latest of the petitions, filed in December 2017, which was still pending at the time the Petitioner responded to the RFE.

³ The Petitioner's charts have smaller figures for the combined underpayments – \$137,832.16 in 2015, \$228,936.24 in 2016, and \$175,496.74 in 2017 – which were calculated by subtracting the total amount of “overpayment” to I-140 beneficiaries whose wages paid exceeded their proffered wages from the total amount of “underpayment” to the I-140 beneficiaries who were paid less than their proffered wages.

⁴ Net income was recorded on page 1, line 28, of the Forms 1120. Net current liabilities were determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18 of Schedule K.

net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner indicates that it has been in business since 2006 and had 41 employees at the time the petition was filed in 2016. The record includes copies of the Petitioner's federal income tax returns for the years 2014-2016, but not for any earlier years. The tax returns recorded gross receipts of approximately \$8.1 in 2014, \$7.5 in 2015, and \$9.5 in 2016. These figures do not show consistent growth during that three-year period and do not cover a sufficient period of time to draw any conclusions about whether the Petitioner has an established pattern of growth. There is no evidence regarding the Petitioner's reputation within the industry.

The Petitioner asserts that it has an investment account with [REDACTED] consisting of liquid assets that were and are available to pay its proffered wage obligations. The Petitioner has submitted several monthly statements showing that the account balance was \$510,135 at the end of 2016, \$428,330.67 at the end of 2017, and \$231,800.37 at the end of March 2018. With regard to 2015, the Petitioner states that the account had a year-end balance of \$554,399, as recorded in its 2015 federal income tax return in line 9 of Schedule L. The investment account cannot be considered in our analysis of the Petitioner's ability to pay its proffered wage obligations, however, because it is not listed as a "current" asset on the Petitioner's federal income tax returns.⁵ Net current assets are the difference between a petitioner's current assets and its current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. The Petitioner has not shown that the [REDACTED] investment account had the necessary liquidity to be available to pay its proffered wage obligations from the priority date onward. Thus, the Petitioner has not shown that the Regal Securities investment account represented additional funds that would have been available in 2015 and subsequent years to cover the proffered wage obligations to its I-140 beneficiaries.

Based on the entire record, therefore, we find that the Petitioner has not established its ability to pay the proffered wages of all its I-140 beneficiaries from the priority date of March 11, 2015, onward.

⁵ The Petitioner states that its investment account with [REDACTED] at the end of 2015 was recorded as an asset in Schedule L, line 9 of its Form 1120 (while current assets are recorded exclusively in lines 1-6 of Schedule L).

III. CONCLUSION

The motions will be denied because the Petitioner has not established its eligibility for the immigration benefit sought. In particular, the Petitioner has not established its continuing ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries from the priority date of this petition up to the present.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-T-, Inc.* ID# 1209990 (AAO Aug. 14, 2018)